IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

MONDAY, THE 25TH JUNE 2007 / 4TH ASHADHA 1929

AFA.No. 64 of 1997()

AGAINST THE JUDGEMENT/ORDER IN AS.17/1988
OS.4/1978 of DISTRICT COURT, THRISSUR
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APPELLANT:
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1. PAVUNNY, S/O. OUSEPH, KALANS HOUSE, NELLAI, TRICHUR DIST.

2. KALAN PHARMACEUTICALS, NELLAI, TRICHUR DIST.

ADDL. APPELLANT:
VARGHESE, S/O. LATE PAVUNNI, KALANS HOUSE, DO. DO.

(ADDL. APPELLANT NO.3 IMPLEADED AS PER ORDER DATED 29.8.2000 ON CMP 4032/2000)

BY ADV. SRI.M.C.SEN (SR.)
SRI.G.UNNIIKRISHNON
SRI.SABU GEORGE
SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN

RESPONDENTS:
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1. ANNAM, W/O. LATE KALATH LONAPPAN, KALAN HOUSE,
NELLAI P.O., PIN-680 305.

2. K.L. JOSEPH, C/O ANNA AYURVEDIC NURSING HOME,
VELENCIA, MANGALORE - 575 OO2, KARNATAKA.

3. ROSY SUNNY, THOTTUNGAL HOUSE, VILANGAM P.O., TRICHUR DIST.

4. CHERIYAN, S/O. LATE K.D. LONAPPAN, NELLAI P.O., 680 305, TRICHUR DIST.

5. VARGHESE, DO. DO.

6. PAULI, DO. DO..

BY ADV. SRI.V.O.JOHN
SRI.P.C.IYPE

THIS APPEAL FROM FIRST APPEAL HAVING BEEN FINALLY HEARD ON 15/06/2007, THE COURT ON 25/6/2007 DELIVERED THE FOLLOWING:

ORDER ON CMP NO.5735/1997

DISMISSED

25/6/2007 SD/- KURIAN JOSEPH, JUDGE.

SD/- T.R. RAMACHANDRAN NAIR, JUDGE.

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P.S. TO JUDGE

Kurian Joseph & T.R. Ramachandran Nair, JJ.

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9.12.1987. Appeal, A.S. No.17/1988 was filed by the appellants on 12.1.1988. This was done without producing a printed copy of the judgment and with a copy of the last paragraph of the judgment, evidently issued as per Rule 6-A of Order XX of the Code of Civil Procedure. Along with the appeal, it is also seen that the appellants filed C.M.P. NO.1087/1988 requesting for two months time for production of the printed copy of the judgment. This request was granted by this court on 13.1.1988. It is also to be seen that this court in C.M.P. No.1088/1988 had granted an interim order of stay of operation of the judgment and decree of the trial court. Finally, the appellants filed C.M.P. No.4008/1997 to dispense with the production of the printed copy of judgment and filed another petition as C.M.P. No.4316/1997 to enlarge the time for production of the decree by invoking Sections 148 & 151 of the C.P.C. A copy of the decree was also produced on 13.8.1997. This is the factual matrix arising from the dispute involved in this appeal.

4. The learned single judge considered the question whether time could be granted to produce the printed copy of the judgment while considering the prayer of the appellants made in C.M.P. NO.4008/1997. It was found, on a reading of Rule 258(1) of the Civil Rules of Practice, that as the judgment exceeds 700 words, it was bound to be printed.

C.M.P.No.4008/97 to dispense with its production, was not allowed as it is belated. It is also noted in paragraph 5 of the judgment that the District Court had informed this court that the judgment had not been printed and no steps were taken for getting it printed also which is evidenced by letter dated 3.9.1997 of the District Judge.

5. The learned Single Judge then proceeded to consider the question whether the appeal which was filed without production of the copy of the decree is maintainable. It was found that once the decree is drawn, the last paragraph of the judgment drawn under Rule 6-A will cease to be a decree for the purpose of execution or for any other purpose. It was then considered whether the application filed under Rule 148 for enlargement of time could be allowed or not. Ultimately it was held that there is gross delay in producing the decree, that by the time it was produced the appeal was time barred and therefore the appeal is not maintainable.

6. Mr. M.C. Sen, learned Senior Counsel arguing for the appellants, contended that the view taken by the learned Single Judge that the appeal is not maintainable, is not correct and at any rate, by exercise of power under Section 148, time for production of the decree could have been extended and could not have been dismissed on a technical plea rather than on the merits. It was further submitted that even though the time granted for

production of printed copy of judgment was over, nothing prevents the court from extending the period or dispensing with its production as prayed for. He invited our attention to the decisions of the Supreme Court in **Shaikh Salim Haji Abdul Khayumsab v. Kumar and others (**(2006) 1 SCC 46) **and Uday Shankar Triyar v. Ram Kalewar Prasad Singh and another** ((2006) 1 SCC 75) and a decision of the Madras High Court in **L. Varadarajan and others v. Thomas and others** (AIR 2000 Madras 283).

7. Shri Jimmy John, learned counsel who appeared for the respondents supported the reasoning adopted by the learned Single Judge. On a careful analysis of the issues raised, we find that the principles stated in (2006) 1 SCC 75 applies to the circumstances of this case. While considering a similar question where an appeal was dismissed for the reason that the vakalathnama accompanying the memorandum of appeal was not signed by one of the appellants, their Lordships declared the law thus:

> " Any defect in signing the memorandum of appeal or any defect in the authority of the person signing the memorandum of appeal, or the omission to file the vakalatnama executed by the appellant along with the appeal, will not invalidate the memorandum of appeal, if such omission or defect is not deliberate and the signing of the memorandum of appeal or the presentation thereof before the appellate court was with the knowledge and authority of the appellant. Such omission or defect being one relatable to procedure, can subsequently be corrected. It is the duty of the office to verify whether the memorandum of appeal was signed by

> the appellant or his authorised agent or pleader holding appropriate vakalatnama. If the office does not point out such defect and the appeal is accepted and proceeded with, it cannot be rejected at the hearing of the appeal merely by reason of such defect, without giving an opportunity to the appellant to rectify it. The requirement that the appeal should be signed by the appellant or his pleader (duly authorised by a vakalatnama executed by the appellant) is, no doubt, mandatory. But it does not mean that non-compliance should result in automatic rejection of the appeal without giving an opportunity to the appellant to rectify the defect. If and when the defect is noticed or pointed out, the court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memoradum of appeal or by furnishing the vakalatnama. It should also be kept in view that if the pleader signing the memorandum of appeal has appeared for the party in the trial court, then he need not present a fresh vakalatnama along with the memorandum of appeal, as the vakalatnama in his favour filed in the trial court will be sufficient authority to sign and present the memorandum of appeal having regard to Rule 4(2) of Order 3 CPC, read with Explanation © thereto. IN such an event, a mere memo referring to the authority given to him in the trial court may be sufficient. However, filing a fresh vakalatnama with the memo of appeal will always be convenient to facilitate the processing of the appeal by the office."

8. Shri M.C. Sen, learned Senior Counsel, relying upon the decision of the Supreme Court in (2006) 1 SCC 46, also argued that the principle stated therein on an interpretation of Order VIII Rule 1 and proviso relating to the time fixed for acceptance of written statement, will apply here also. Their Lordships held in paragraphs 10, 11 and 12 are the following:

> " 10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial

> system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.
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> 11. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.
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> 12. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence, processual, as much as substantive."

It is clear from the principles as stated by the Apex Court that procedural defects which are curable, should not be allowed to defeat substantive rights. Of course, exceptions to the same have also been pointed out.

9. This is a case where the appeal was accepted and an interim order of stay of execution of the decree was passed and it is an admitted case that the appeal was accepted based on the copy of the last paragraph of the judgment and the certificate. At no point of time, any defect was pointed out and the matters were allowed to stand. The appellants were never cautioned of any defect by the Registry also. Time was granted to produce printed copy of the judgment. Apart from that, Section 148 of the C.P.C. grants absolute discretion to the court to enlarge the period prescribed or

allowed by the court even though the period originally fixed or granted may have expired. It is therefore clear that the court was having ample power to grant extension of time to produce the decree, since at the time of filing the appeal it was a competent one. It is clear from the facts that it was only a procedural defect which could have been cleared by the appellants, if put to notice. As held by the Apex Court, "procedure, a handmade to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use." It is not a case where this procedural defect is not rectified even after it is pointed out and due opportunity given for rectifying it. There was no deliberate or mischievous act on the part of the appellants also. There is nothing to show that the rectification of the defect would affect the case on merits or will affect the jurisdiction of the court. It is to be noticed that when the appeal was presented it was a competent one and was accepted by this court. It is not a case where any specific consequence has been provided for non compliance. Even though sub-rule (2) of Rule 6-A of Order XX C.P.C. provides that as soon as a decree is drawn, the last paragraph of the judgment shall cease to have the effect of a decree for the purpose of execution or for any other purpose, it is evident from the facts of this case that appeal was filed before the decree was drawn up. Therefore, when the appeal was filed, it was a competent one. In

C.M.P. No.1087/1988, two months time for production of printed copy of the judgment was also granted by this court on 13.1.1988. Going by the power conferred under Section 148 C.P.C., it is evident that this court had power to grant enlargement of time to produce the printed copy. Learned Senior Counsel also pointed out that the entire records were before this court which include the decree itself. Therefore, the dismissal of C.M.P. Nos.4008/97 and 4316/1997 was not in order, particularly in the light of the principles stated by the Apex Court. It is true that Order XLI Rule 1 mandated that the memorandum of appeal shall be accompanied by a copy of the decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded. But as noted above, in this case the appeal was filed with the certificate under Rule 6-A of Order XX C.P.C. with the last paragraph of the judgment. Therefore, the rigor of Order 41 Rule 1 that the appeal shall be accompanied by a copy of the decree obviously does not apply here and on that ground the appeal could not have been dismissed as not maintainable. One more important aspect is also to be noticed here. Order 41 Rule 1 C.P.C. Has been amended by Act 46 of 1999. The amendment reads as follows:

> "(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to

such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment."

The legislative intent is clear from the amendment.

10. The decision of the Madras High Court in AIR 2000 Madras 283 is directly on the point. After referring to the various decisions of the Apex Court, the learned judge held in paragraph 11 as follows:

> " From the above decisions, it is clear that in a proper case, the court can give time for production of copy of decree and powers under Sections 148 and 151 of the Code of Civil Procedure also could be invoked and if a copy of decree is produced within the time granted, the appeal must be deemed as presented properly. In this case, the lower court has exercised the discretion that due to urgency, the respondents must be given some time for production of copy of decree. Even though the argument of the learned counsel for the petitioners that the court has no power to dispense with the production of copy of decree for filing the appeal is correct, that does not follow that the lower court has no power to grant time for production of copy of decree. By granting time, it is not dispensing with the prosecution of copy of decree."

Hence, it is clear that in a proper case the court can give time for production of the copy of decree and that the powers under Section 148 and 151 C.P.C. are available. As held by the Madras High Court, by granting time, the court is not dispensing with the production of copy of the decree. The court had ample power under Sections 148 and 151 C.P.C. to grant time for production of the copy of the decree. In this case also, C.M.P. No.4316/1997 was filed under Sections 148 and 151 C.P.C. to enlarge the

time for production of the decree. The request was only to grant time for production of the copy of decree and for not dispensing with the same and the decree was produced before this court also. It is therefore clear that it was not a case where there was lack of power to entertain the appeal.

11. Shri Jimmy John contended that because of the provisions under sub-rule 2 of Rule 6A once the decree is drawn up, the last paragraph of the judgment as certified by the court, will cease to have effect for the purpose of execution or for any other purpose. We fail to see how the same will affect the prosecution of the appeal here. The respondents had not raised any objection regarding the non-maintainability of the appeal at any time before its hearing. The office had also not pointed out any defect and there was no occasion for the appellants to defy any direction to cure such defect also. Therefore, once the appeal was accepted and having been filed properly and as the same was pending without any complaint regarding its non-maintainability from any quarters, and when the appellants sought to invoke the power of this court conferred under Sections 148 and 151 C.P.C., we are of the view that it is a clear case where the said power had to be exercised and the appellants should have been granted time as requested for and the delay, if any, should have been condoned and the decree should have been accepted. We also note that if such an opportunity is denied to

the appellants, substantial injustice will be caused to them as the merits of the appeal is left without any adjudication. The substantive rights of the parties ought not to be defeated by such exercise.

In the result, the appeal is allowed and s the judgment of the learned Single Judge is set aside. We allow C.M.P.4008/1997 to dispense with the production of printed copy of the judgment and C.M.P. No.4316/1997 to enlarge the time for production of the decree. As the certified copy of the decree has been produced, it is ordered that the appeal will be treated as competent. Therefore, we direct the appeal to be disposed of on merits. Status-quo as on today will be maintained till the disposal of the appeal.

The appeal is allowed as above. No costs.

(Kurian Joseph, Judge.)

(T.R. Ramachandran Nair, Judge.)

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